

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

KEVIN JACK MCMILLAN,

3:16-cv-02356-BR

Plaintiff,

OPINION AND ORDER

v.

Commissioner, Social Security  
Administration,

Defendant.

KEVIN JACK MCMILLAN  
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Monmouth, OR 97361  
(503) 917-9481

Plaintiff, *Pro Se*

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**BROWN, Senior Judge.**

Plaintiff Kevin Jack McMillan seeks judicial review of a final decision of the Commissioner of the Social Security Administration (SSA) in which he denied Plaintiff's application for Disability Insurance Benefits (DIB) under Title II of the Social Security Act. This Court has jurisdiction to review the Commissioner's final decision pursuant to 42 U.S.C. § 405(g).

Following a review of the record, the Court **AFFIRMS** the decision of the Commissioner and **DISMISSES** this matter.

**BACKGROUND**

Plaintiff filed an application for DIB on February 25, 2010, alleging a disability onset date of December 15, 2001. Tr. 19-23.<sup>1</sup> On March 15, 2010, his application was denied on the ground that Plaintiff did not have enough quarters of coverage to qualify for benefits. Tr. 24-26. On March 9, 2011, Plaintiff's

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<sup>1</sup> Citations to the official transcript of record filed by the Commissioner on August 11, 2017, are referred to as "Tr."

application was denied on reconsideration on the ground that Plaintiff did not have enough quarters of coverage to qualify for benefits and Plaintiff had not "submitted an W-2's [sic] to support additional earnings." Tr. 27-28.

Plaintiff filed a second application for DIB on May 12, 2011, alleging a disability onset date of June 6, 2011. Tr. 35-38. On May 17, 2011, his application was denied on the ground that Plaintiff did not have enough quarters of coverage to qualify for benefits. Tr. 39-41.

On April 2, 2013, the Commissioner sent Plaintiff a letter in which she provided "information regarding insured status, work and case history." Tr. 45. Specifically, the Commissioner noted Plaintiff's date first insured is April 1, 1990, and his date last insured is June 30, 1993. The Commissioner also noted:

No social security taxable wages reported 1993-1998. Work activity resumes and 4 quarters of coverage earned each of the following years 1999, 2000 and 2001. The earnings, although material do not establish a new period of insured status.

Tr. 45. Plaintiff requested a hearing.

On March 27, 2014, Matthew Brown submitted a statement to the Commissioner in which he noted he was Plaintiff's supervisor in a construction and landscaping business in 1996. Tr. 66. Brown stated Plaintiff "worked under [his] supervision during the months of July, August and September 1996. He earned a salary of \$1,800 for those three months." Tr. 66.

An Administrative Law Judge (ALJ) held a hearing on April 8, 2014. Tr. 75-91. At the hearing Plaintiff was not represented. Plaintiff testified he did not file a tax return in 1996 or pay FICA taxes on the earnings noted by Brown in his March 27, 2014, letter. Tr. 89. Plaintiff also testified he worked at the construction and landscaping business again in 1997, and he believed he filed a tax return for 1997. Tr. 88-89. The ALJ suggested Plaintiff supplement the record with his 1997 tax return and/or other evidence to establish that he had taxed Social Security earnings in 1997. Tr. 89.

After the hearing Plaintiff submitted to the ALJ an Account Transcript from the Internal Revenue Service (IRS), which showed Plaintiff filed a tax return for 1997 showing \$3,844 in gross income for 1997. Tr. 68. The Account Transcript, however, did not reflect whether Plaintiff filed a W-2 or paid any FICA taxes on his income.

On April 25, 2014, the ALJ issued a decision in which he found Plaintiff did not have enough quarters of coverage to qualify for the benefits as of his June 6, 2001, alleged onset date. Tr. 14-18. Specifically, the ALJ noted:

[T]he time limit to change [Plaintiff's] earnings record has expired (well over three years, three months, and 15 days have passed since 1997), and [Plaintiff] has not produced satisfactory evidence that shows SSA records are incorrect. [Plaintiff] credibly testified that he did not file a tax return in 1996 and [Plaintiff's] employer also did not report any wages that year to the IRS. This

testimony clearly shows [Plaintiff] did not pay any FICA taxes for 1996. [Plaintiff] . . . submit[ted] a transcript from the IRS showing he filed a tax return in 1997, however, this document does not show any W2 was filed . . . or that [Plaintiff] or his employer paid any FICA taxes that year.

Tr. 18. The ALJ also noted even if Plaintiff's earning record included four quarters for 1997, he would only have 14 quarters in the relevant period "when he needs to have 17 for insured status on June 6, 2001." Tr. 18. Accordingly, Plaintiff did not have insured status for DIB at the time of his alleged onset date.

On June 12, 2014, Plaintiff filed a request for review of the ALJ's decision in which he noted the IRS no longer had a copy of his 1997 tax return and "in lieu sent a 1099," which Plaintiff enclosed with his request for review. Tr. 74.

On April 29, 2016, the ALJ's decision became the final decision of the Commissioner when the Appeals Council denied Plaintiff's request for review. Tr. 5-7. See *Sims v. Apfel*, 530 U.S. 103, 106-07 (2000).

#### STANDARDS

The initial burden of proof rests on the claimant to establish disability. *Ukolov v. Barnhart*, 420 F.3d 1002, 1004 (9<sup>th</sup> Cir. 2005). To meet this burden, a claimant must demonstrate his inability "to engage in any substantial gainful

activity by reason of any medically determinable physical or mental impairment which . . . has lasted or can be expected to last for a continuous period of not less than 12 months."

42 U.S.C. § 423(d)(1)(A). The Commissioner bears the burden of developing the record. *Reed v. Massanari*, 270 F.3d 838, 841 (9<sup>th</sup> Cir. 2001).

The district court must affirm the Commissioner's decision if it is based on proper legal standards and the findings are supported by substantial evidence in the record as a whole.

42 U.S.C. § 405(g). See also *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9<sup>th</sup> Cir. 2004). "Substantial evidence means more than a mere scintilla, but less than a preponderance, i.e., such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 882 (9<sup>th</sup> Cir. 2006) (internal quotations omitted).

The ALJ is responsible for determining credibility, resolving conflicts in the medical evidence, and resolving ambiguities. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001). The court must weigh all of the evidence whether it supports or detracts from the Commissioner's decision. *Robbins*, 466 F.3d at 882. The Commissioner's decision must be upheld even if the evidence is susceptible to more than one rational interpretation. *Webb v. Barnhart*, 433 F.3d 683, 689 (9<sup>th</sup> Cir.

2005). The court may not substitute its judgment for that of the Commissioner. *Widmark v. Barnhart*, 454 F.3d 1063, 1070 (9<sup>th</sup> Cir. 2006).

## DISCUSSION

### **I. Calculation of quarters of coverage.**

Before the Commissioner can make a determination as to a claimant's disability, the claimant must establish he became disabled during a period in which he had "insured status" under Title II of the Social Security Act (SSA). 42 U.S.C. § 416(i)(3). See also *Tidwell v. Apfel*, 161 F.3d 599, 601 (9<sup>th</sup> Cir. 1999); *Foster v. Astrue*, No. 09-CV-1422-BR, 2011 WL 530864, at \*2 (D. Or. Feb. 8, 2011). To establish disability insured status under the SSA, a claimant must show he was both fully insured and that he had sufficient quarters of coverage.

"A quarter of coverage (QC) is the basic unit of social security coverage used in determining a worker's insured status. [The Commissioner] credit[s] [claimants] with QCs based on [their] earnings covered under social security." 20 C.F.R. § 404.140(a). For income earned after 1977 the Regulations governing calculation of quarters of credit provide in pertinent part:

[W]e credit you with a QC for each part of the total wages paid . . . to you in a calendar year that equals the amount required for a QC in that

year. For example, if the total of your wages . . . for a calendar year is more than twice, but less than 3 times, the amount required for a QC in that year, we credit you with only 2 QCs for the year. . . . In addition, we cannot credit you with more than four QCs for any calendar year.

20 C.F.R. § 404.142(a). Finally, the Regulations also provide:

In general, your social security benefits are based on your earnings that are on our records . . . . Basically, you receive credit only for earnings that are covered for social security purposes. The earnings are covered only if your work is covered. If you are an employee, your employer files a report of your covered earnings.

20 C.F.R. § 404.1001(a)(1). Individuals who become disabled after age 31 are required to have not "less than 20 quarters of coverage during the 40-quarter period which ends with" the quarter in which the disability occurred. 42 U.S.C.

§ 416(i)(3)(B)(I). If an individual becomes disabled before age 31, however, the individual is insured if he has "QCs in at least one-half of the quarters during the period ending with that quarter and beginning with the quarter after the quarter [the individual] became age 21." 20 C.F.R. § 404.130(c).

Finally, an individual may correct his Social Security earnings record for a particular year "3 years, 3 months, and 15 days after any year in which [the individual] received earnings."

20 C.F.R. § 404.802. "After the time limit for any year ends, [the SSA] may correct the record of [an individual's] earnings for that year if satisfactory evidence shows SSA records are

incorrect" and one of several listed exceptions applies.<sup>2</sup> 20  
C.F.R. § 404.822(a).

## **II. Analysis of Quarters of Coverage**

As noted, the Commissioner denied Plaintiff's application for DIB on the ground that he did not have enough quarters of coverage to qualify for benefits as of his June 6, 2001, alleged onset date.

Here Plaintiff alleges he was disabled before age 31. The ALJ, therefore, used the QC calculation method set out in 20 C.F.R. § 404.130(c). Specifically, the ALJ noted Plaintiff turned 21 in the fourth quarter of 1992 and there are 34 quarters between the first quarter of 1993 (the quarter after Plaintiff turned 21) and the second quarter of 2001 (the quarter that includes Plaintiff's alleged onset date). Accordingly, Plaintiff must establish he had 17 QCs during that period in order to be insured. The Plaintiff's SSA earnings record reflects Plaintiff had only 10 QCs during the relevant period. Plaintiff, therefore, did not establish he had sufficient QCs during the relevant period to be insured.

Plaintiff asserts the ALJ erred because Plaintiff should have received an additional four QCs of coverage for 1997 based on his landscaping work. Plaintiff relies on the IRS Account

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<sup>2</sup> Plaintiff does not allege and the record does not reflect any of the listed exceptions applies here.

Report and his statement that he worked and earned wages in 1997. Plaintiff, however, fails to establish that he paid Social Security taxes on his 1997 earnings. Moreover, the IRS Account Transcript reflects Plaintiff did not pay any taxes on his 1997 income. Plaintiff also has not submitted a W-2 form indicating that he paid Social Security taxes in 1997.

In addition, the ALJ found in the alternative that even if Plaintiff's SSA earnings record included the four QCs for 1997, Plaintiff would still have only 14 QCs during the relevant period rather than the 17 QCs required to establish insured status on June 6, 2001.

The Court, therefore, concludes the ALJ did not err when he concluded Plaintiff did not establish he had sufficient QCs to qualify for benefits as of his June 6, 2001, alleged onset date.

### **III. Plaintiff's Other Arguments**

Plaintiff also asserts the ALJ violated his right to due process when he (1) did not allow two lay witnesses to testify on Plaintiff's behalf at the hearing and (2) did not add to Plaintiff's file the medical evidence that Plaintiff submitted.

#### **A. Lay-Witness Testimony**

The record reflects neither of the lay witnesses that Plaintiff sought to call were intended to offer testimony on the sole issue on appeal; *i.e.*, whether Plaintiff paid Social Security taxes on income earned during the relevant period. The

lay-witness testimony, therefore, was irrelevant and would not have affected the outcome of Plaintiff's case. The Court, therefore, concludes the ALJ did not err when he did not permit the two lay witnesses to testify at Plaintiff's hearing.

**B. Medical Evidence**

The ALJ correctly concluded Plaintiff did not establish that he had sufficient QCs to qualify for benefits as of his June 6, 2001, alleged onset date. This is a threshold issue, and, therefore, the ALJ did not determine whether Plaintiff met the medical criteria for disability. Under these circumstances Plaintiff's medical evidence was irrelevant to the issue on appeal.

Accordingly, the Court concludes the ALJ did not err when he did not add Plaintiff's submitted medical evidence to Plaintiff's file.

**CONCLUSION**

For these reasons, the Court **AFFIRMS** the decision of the Commissioner and **DISMISSES** this matter.

IT IS SO ORDERED.

DATED this 15<sup>th</sup> day of March, 2018.

  
ANNA J. BROWN  
United States Senior District Judge